

Chan (Migration) [2017] AATA 2466 (8 August 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Miss Wai San Chan

CASE NUMBER: 1613916

DIBP REFERENCE(S): BCC2015/2441478

MEMBER: Nicholas McGowan

DATE: Tuesday 8 August 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision to cancel the applicant's Subclass 801 (Spouse) visa.

Statement made on 08 August 2017 at 3:00pm

CATCHWORDS

Migration – Cancellation - Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – Incorrect answers in application – Genuine spousal relationship – Incorrect information deliberately provided – Paternity of children - Applicant separated from sponsor shortly after arrival – Infidelity – Consideration of best interests of children – Interests of children not breached

LEGISLATION

Migration Act 1958, ss 5F, 101, 107, 109, 140

Migration Regulations 1994, r 2.41, Schedule 2, cl 820.211, cl 820.221

CASES

MIAC v Khadgi (2010) 190 FCR 248

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the applicant's Subclass 801 (Spouse) visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa on the basis that visa applicant did not comply with s.101(b) because she provided incorrect answers in her application for a visa Subclass 820/801. The issue in the present case is whether that ground for cancellation is made out and if so, whether the visa should be cancelled.
3. The applicant requested review of the delegate's decision and provided the Tribunal with a copy of the Record of Decision of Whether to Cancel Under Section 109 the Migration Act, which the Tribunal notes contains the same particulars as the Notification of Intention to Consider Cancellation (NOICC) Under Section 109 of the Migration Act 1958. Accordingly, there was no requirement to put any of the same information formally to the applicant at hearing which was contained in the decision record. This aspect was explained to the applicant at the hearing and an opportunity given to the agent to respond. The applicant was invited to appear before the Tribunal on 13 December 2016 to give evidence and present arguments. The applicant appeared before the Tribunal as scheduled. The applicant was represented in relation to the review by her registered migration agent.
4. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. The Tribunal has taken into consideration all the evidence in the Department's case file BCC2015/2441478, folios numbered 1-34, and the Tribunal's case file 1613916, folios numbered 1-123 and the evidence provided at the Tribunal hearing.

6. BACKGROUND

7. On 20 June 2011, the applicant applied for a combined Partner Subclass 820/801 visas. The application was based on the applicant's married relationship with Mr Roger Chung Yuen, her Australian citizen sponsor. On 4 December 2012, the applicant was granted a Subclass 801 Partner visa. The officer waived the two year requirement for the second stage of the application process on the basis that there was a declared child of the relationship.

8. Section 109

9. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.

10. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

WAS THERE NON-COMPLIANCE AS DESCRIBED IN THE S.107 NOTICE?

11. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s.101(b) of the Act. This provision provides that a "non-citizen must fill in his or her application form in such a way that ... no incorrect answers are given or provided."
12. As detailed in the NOICC, on 20 June 2011 the applicant lodged a Partner visa application. In the visa application form the applicant provided answers to these questions, about her married relationship with Mr Yuen as follows:
- Question 68) When did you and your fiancé or partner make the decision that you both:
 - a) Wanted to commit to a long-term spouse or interdependent relationship Or
 - b) Intended to marry each other?Response) '10/02/2010'.
 - Question 71) Do you and your finance or partner intend to maintain a lasting relationship?
Response) 'yes'.
 - Question 73) Did you enter into this relationship with your fiancé or partner solely to gain permanent residence in Australia?
Response) 'no'.
13. In addition, the applicant signed the declaration form, which states, in part, "I understand that if I give false or misleading information, my application may be refused, or any visa granted may be cancelled."
14. On 18 August 2016, the applicant responded to the NOICC and provided the Department with information in the form of a Statutory Declaration (contained in the Department's file at folios 21-23). The Tribunal has considered that response as well as her evidence at hearing.
15. The applicant told the Tribunal that the answers and information she provided on the visa application form were correct. She said that she was in a genuine relationship with her former husband (Mr Yuen) and that she had hoped that the child born during their relationship was his. The applicant concedes that that child is not in fact her former husband's, but a child conceived a week prior to her marriage to Mr Yuen, to Mr Dingzhang Luo (who is not an Australian citizen, permanent resident or eligible New Zealand citizen). The applicant had been in a relationship with Mr Luo previously. Since the applicant's separation and divorce from Mr Yuen she has re-commenced a relationship with Mr Luo, and has had a second child to him. In other words, the applicant's personal history shows that she had a relationship with Mr Luo before and after her marriage to Mr Yuen.
16. Either directly before, or just after, her marriage on 6 July 2010, although she was ostensibly in a committed relationship with Mr Yuen since February 2010, the applicant conceived a child with Mr Luo born on 4 April 2011. The applicant was untruthful about the child's paternity both to Mr Yuen and the Department. Further, she was granted a permanent spouse visa in December 2012, but claimed in her application for divorce to

have left the marriage in April 2012 although she continued to hold herself out to be in a spousal relationship to the Department. The applicant then claimed she lied on her divorce application stating she separated from her husband in April 2012 instead of March 2013 in order to circumvent the law and have the divorce finalised early. In either event these actions undermine the applicant's credibility. Even if the Tribunal accepts she left the marriage in March 2013, a mere 3 months after her visa was granted, the fact that the applicant states she was in a de facto relationship with Mr Luo less than a month after her separation, together with their relationship from June 2009 and that she conceived a child with him at the time of her marriage, are strong indicators that she did not want to commit to a long-term spousal relationship with Mr Yuen on 10 February 2010 as stated in her application. Notwithstanding all the above, the Tribunal had regard to all the available evidence on file and was not satisfied that that evidence, collectively outweighed the facts as they relate to the parties circumstances, as set out above. For these reasons, the Tribunal has been satisfied that in considering the s.5F matters, the parties circumstances were such that they met the requirement that they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and the relationship between them is genuine and continuing.

17. The Tribunal is of the view that the applicant was fully aware that the disclosure that she had never been in an exclusive spouse relationship with Mr Yuen would affect the grant of the Partner visa and she made a deliberate decision to provide incorrect answers in order to obtain the Partner visa and permanent residency in Australia.
18. Given her lack of credibility the Tribunal is unwilling to give the applicant the benefit of the doubt that the implausible sequence and timing of the events surrounding her relationship with Mr Luo is not evidence that she was not in a genuine and continuing relationship with Mr Yuen to the exclusion of all others at the time of application or at all. The Tribunal is satisfied that she did not intend to maintain a lasting relationship with Mr Yuen and that she married Mr Yuen for the sole purpose of obtaining permanent residence in Australia. The Tribunal finds that the answers the applicant provided to questions 68, 71 and 72 in Form 49SP of her application were completed in such a way that incorrect answers were given or provided. The Tribunal finds that the applicant breached s.101 of the Act.
19. For these reasons, the Tribunal finds that there was non-compliance with s.101(b) by the applicant in the way described in the s.107 notice.
20. **Should the visa be cancelled?**
21. As the Tribunal has decided that there was non-compliance in the way described in the notice given to the applicant under s.107 of the Act, it is necessary to consider whether the visa should be cancelled pursuant to s.109(1). Cancellation in this context is discretionary, as there are no mandatory cancellation circumstances prescribed under s.109(2).
22. In exercising this power, the Tribunal must consider the applicant's response (if any) to the s.107 notice about the non-compliance and have regard to any prescribed circumstances: s.109(1)(b) and (c).
23. The prescribed circumstances are set out in r.2.41 of the Regulations. Briefly, they are: the correct information; the content of the genuine document (if any); whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document; the circumstances in which the non-compliance occurred; the present circumstances of the visa holder; the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of

Division 3 of Part 2 of the Act; any other instances of non-compliance by the visa holder known to the Minister; the time that has elapsed since the non-compliance breaches and any contribution made by the holder to the community.

24. Whilst these factors must be considered, they do not represent an exhaustive statement of the circumstances that might properly be considered to be relevant in any given case: *MIAC v Khadgi* (2010) 190 FCR 248. The Tribunal may also have regard to lawful government policy. The relevant policy is set out in the Department's Procedural Advice Manual) PAM3 'General visa cancellation powers'. This policy requires delegates to also have regard to matters such as whether the visa would have been granted if the correct information had been given, whether there are persons in Australia whose visa would, or may, be automatically cancelled under s.140 of the Act, and whether the visa cancellation may result in Australia breaching its international obligations.

THE CORRECT INFORMATION

25. Based on the Tribunal's findings above, the correct information in this case is that on 20 June 2011 the applicant did not intend to maintain a lasting relationship with Mr Yuen. She did not make the decision that she wanted to commit to a long-term spousal relationship with him on 10 February 2010 and she did enter into her relationship with Mr Yuen solely to gain permanent residence in Australia.

THE CONTENT OF THE GENUINE DOCUMENT (IF ANY)

26. Reg. 2.41(b) is not relevant in the present case

27. Whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document

28. For the reasons above, the Tribunal is not satisfied that the applicant was in a genuine spousal relationship with Mr Yuen at any time and not satisfied that the applicant had a commitment to a shared life as a spouse partner to the exclusion of all others. In the Tribunal's view, the applicant provided incorrect answers in the visa application that went directly to whether the applicant was in a spousal relationship with Mr Yuen as defined in the Act. The Tribunal finds that if the correct answers were known, the applicant would have been unable to meet the definition of 'spouse' in s.5F because the fact that she did not intend to maintain a lasting relationship with Mr Yuen, did not make the decision that she wanted to commit to a long-term spousal relationship with him on 10 February 2010, and she entered into the relationship solely to gain permanent residence in Australia means she would not have met the requirements that the parties had a mutual commitment to a shared life as spouse partners to the exclusion of all others.

29. As a result, the applicant would not have been able to meet the requirements of cl.820.211 and cl.801.221. The Tribunal finds that the grant of the visa was based partly on incorrect answers and had the correct answers been known, the applicant would not have been granted the Class BS visas.

THE CIRCUMSTANCES IN WHICH THE NON-COMPLIANCE OCCURRED

30. The non-compliance occurred when the applicant provided incorrect information in answers to relevant questions to the Department in her application for a Combined Partner Subclass 820 and Subclass 801. In the view of the Tribunal, it must have been obvious to the applicant that if she was seeking a Partner visa and expressly claimed to be in committed spouse relationship with the sponsor, then any information that may indicate that such relationship was not genuine and exclusive would be relevant to her application.

31. *The present circumstances of the visa holder*

32. The applicant told the Tribunal that she is a mother to two children (who are sisters with the same biological father, Mr Lou). The applicant told the Tribunal she has visited China twice over recent years – this year for a month, and in 2013 for two-and-a-half months. The applicant stated that her elder daughter suffers from asthma, and that was exacerbated while they were in China. While the Tribunal accepts the child has asthma, there is no evidence to suggest that the child is unable to reasonably manage this condition, or that her medical status, or any anticipated exacerbation, would be caused such that the Tribunal would make a favourable decision on that basis.

THE SUBSEQUENT BEHAVIOUR OF THE VISA HOLDER CONCERNING HIS OR HER OBLIGATIONS UNDER SUBDIVISION C OF DIVISION 3 OF PART 2 OF THE ACT

33. The Tribunal has no relevant information regard any adverse subsequent behaviour of the visa holder concerning her obligations, and none have been declared by the applicant when asked by the Tribunal during the hearing. Nonetheless, the Tribunal is of the view that had the NOICC not been sent to the applicant she would not have provided the correct information to the Department. This was provided because ultimately the biological father of their first born daughter is subsequently seeking to progress his own migration application.

ANY OTHER INSTANCES OF NON-COMPLIANCE BY THE VISA HOLDER KNOWN TO THE MINISTER

34. The applicant has no other non-compliance matters that the Tribunal has become aware of, or which have been declared by the applicant to the Tribunal when asked.

THE TIME THAT HAS ELAPSED SINCE THE NON-COMPLIANCE

35. The applicant applied for the Partner visa on 20 June 2011 and more than five years have elapsed since the non-compliance with s.101 of the Act.

ANY BREACHES OF THE LAW SINCE THE NON-COMPLIANCE AND THE SERIOUSNESS OF THOSE BREACHES

36. There is no information before the Tribunal that the applicant has any further breaches of the law. This matter was discussed with the applicant, and no breaches were declared.

ANY CONTRIBUTION MADE BY THE HOLDER TO THE COMMUNITY

37. The applicant told the Tribunal that she is a full time mother to her two daughters, and wife to her partner, Mr Luo. The applicant made no claim of any contribution made to the community, although she indicated that in the future her daughters would become productive and waged citizens who would contribute more broadly to the community through their participation in the community, workforce and taxation system.

WHETHER THE VISA WOULD STILL HAVE BEEN GRANTED IF THE CORRECT INFORMATION HAD BEEN GIVEN

38. This issue has been addressed elsewhere. The Tribunal has found that the applicant would not have been granted a visa if the decision-maker had been given the correct information.

WHETHER THERE ARE PERSONS IN AUSTRALIA WHOSE VISAS WOULD, OR MAY, BE CANCELLED UNDER S.140

39. A child born 7 April 2011, to the applicant from her relationship with Mr Lou, and who was the basis for the Minister's delegate waiving the two year waiting period between the grant of the temporary permanent partner visa would, or may, have her visa cancelled under s.140.
40. A second child born 2 January 2015 to the applicant and Mr Lou has no visa, as she was born in Australia.

41. Whether Australia has obligations under relevant international agreements

42. Whether Australia has obligations under relevant international agreements that would or may be breached as a result of the visa cancellation, for example if there are children in Australia whose interests could be affected by the cancellation, or who would themselves be affected by consequential cancellation, the best interests of the children are to be treated as a primary consideration. Australia is bound by the principals of the convention on the Rights of the Child (CROC). Article 3 states that in all actions that concern or affect a child, the best interests of the child shall be a primary consideration. Article 7 and 9 focus on the importance of preserving the family unit, not separating children from their parents.
43. Both children in this case have been born to parents who are Chinese citizens. As such they have the capacity to return to China with their children and live there as a family. The Tribunal notes that the levels of education and health may be comparable as that in Australia. The best interests of the children are not, in the Tribunal's view, breached should their parents be required to return to China and raise them, because there is no evidence that they are unable to do this successfully, and because the children have spent considerable time there in recent years with their mother, and each of them has the support of extend family which lends further support to their return.

44. FINDINGS

45. The Tribunal has considered the evidence individually and as a whole. The Tribunal is not satisfied that the applicant was in a genuine spousal relationship with Mr Yuen, as she claimed in her visa application. The Tribunal has weighed the applicant's circumstances against the adverse findings that the Tribunal has made above regarding the applicant deliberately answering questions incorrectly in order to gain her visa. The Tribunal has formed the view that the breach has been significant, central to the applicant's ability to be granted the spouse visa. It has also considered the purpose of the visa, which is to allow an applicant to stay in Australia with his or her spouse. Given that this applicant is not, and has never been, in a spousal relationship, and in light of all the considerations above, the Tribunal has found that the adverse circumstances in favour of cancelling the visa outweigh the circumstances favouring the applicant for not cancelling the visa.
46. The Tribunal has found that the s.107 notice is valid and has decided that there was non-compliance by the applicant in the way described in the notice given under s.107 of the Act. Further, the Tribunal has considered the evidence individually and as a whole and having regard to all the relevant circumstances, as discussed above, the Tribunal concludes that the visa should be cancelled.

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ATTACHMENT – Relevant Extracts from the *Migration Act 1958*:

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
 - (c) stating that the Minister will consider cancelling the visa:

- (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.